IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 209 of 1983

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NAJA HAMIR - Appellant(s)
Versus
STATE OF GUJARAT - Defendant(s)

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Appearance :
MR HP RAVAL for Appellant(s) : 1,
DIPEN DESAI, AGP for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 18/07/2006

ORAL JUDGMENT

1. Appellant-plaintiff, being aggrieved by the judgment and decree dated 17th March, 1983 passed in Civil Regular Appeal No. 78/82 by the learned

District Judge, Junagadh, reversing the judgment and decree passed in Regular Civil Suit No. 138/80 by the Court of 3rd Joint Civil Judge [S.D.], Junagadh, whereunder the learned trial Judge had decreed the suit, has preferred this appeal under Section 100 of the Code of Civil Procedure.

2. The facts necessary for disposal of the present appeal in nutshell are that the plaintiff was appointed as Beat Guard on purely temporary basis against permanent post on 23.3.78. The appointment order provided that in case, the plaintiff was to leave job, then, he would be required to give one month's notice or in the alternative, forego salary of one month. However, a declaration was sought from the plaintiff employee in favour of the State that the State would be entitled to remove him from the services.

3. For a period between 22.10.78 and 9.11.78, the plaintiff was on leave, but in between on 27.10.78, theft of bamboo sticks was reported to

the authorities. The authorities, finding that one Shri Gajera and yet another man might have been involved or lacked in discharge of duties, subjected those two persons to the departmental inquiry. Departmental inquiry ended in favour of Shri Gajera and he was exonerated. However, the plaintiff was removed from service with effect from 3.11.78. The order was an order of simple discharge or removal simplicitor.

4. The plaintiff, on these facts and premise aforesaid, filed a suit seeking declaration that his termination was contrary to law, suffered with arbitrariness and was not in accordance with fair play, because, persons junior to him were retained in services. In the suit, the plaintiff made an application for grant of temporary injunction. The State Government, instead of filing separate written statement and reply to the injunction application, filed combined reply to the application so also to the plaint. All through, the said reply-cum- written statement has been taken to be so by the parties

and subordinate courts.

5. It is also to be noted that after the issues were cast, parties were put to strict proof of their respective pleadings and the case, but the plaintiff simply relied upon certain documents and inquiry report pertaining to Mr. Gajera, he did not lead any oral evidence. The State Government also did not lead any evidence. After hearing the parties and perusing the records, specially undisputed documents, the trial court held that the plaintiff was successful in proving his case, he could give a dent to the order of discharge on the ground that it was arbitrary and consequently, it was penal in nature. The State Government, being aggrieved by the said judgment and findings, preferred First Appeal under Section 96 of the Code of Civil Procedure [for short “the Code”]. After hearing the parties, the learned first appellate court held that the trial court was unjustified in observing that there was tacit admission on the part of the State Government, there was no

material on the records to show or suggest that juniors to the plaintiff were retained in services or present was a case where instead of awarding penalty, order of discharge was issued. It accordingly allowed the appeal and dismissed the suit.

6. The plaintiff, being dissatisfied and aggrieved by the judgment of the first appellate court, is before this Court under section 100 of the Code.

7. Appeal has been admitted for hearing parties on the following substantial questions of law.

“1. Whether the order dated 3rd November 1978 is an order of simple termination or is penal in nature?

2. Whether order of termination simplicitor would be void on the ground of arbitrariness from the fact that the respondent State had terminated the service of the appellant while detaining his juniors in service?

3. Whether the impugned order is illegal or

void on the ground of pick and choose inasmuch as the respondent has not specifically denied the allegation in the plaint that the service of the plaintiff-appellant were terminated whereas his juniors were continued in service?

8. Mr. H.P. Raval, learned counsel for the appellant-plaintiff submits that the defendant State did not deny material facts pleaded by the plaintiff, therefore, the trial court was justified in assuming that the facts were undisputed. His further submission is that from the records, it would clearly appear that against permanent employees, departmental proceedings were initiated, but plaintiff was unceremoniously removed from services, he being temporary employee. His further submission is that after lifting a veil, the Court would be able to find that the order suffers with whims, caprice and arbitrariness. He also submitted that as the State Government did not bring on records reasons for simple discharge and did not

deny plaintiff's allegations about penal action, trial court was justified in decreeing the suit.

9. Mr. Dipen Desai, learned AGP, on the other hand, submitted that the trial court proceeded on presumptions, less appreciating the legal provisions and also did not appreciate that production of the documents is not proof of the same. According to him, present was a case where simple allegation of retention of juniors to petitioners would not suffice but the plaintiff was required to prove the fact by bringing cogent evidence on the records.

10. I have heard the parties at length. So far as substantial question of law no.1 is concerned, it can straightaway be answered against the interest of the plaintiff. The question was whether the order dated 3rd November 1978 is an order of simple termination or is penal in nature. The plaintiff has not come out with the case that instead of awarding any penalty, order

of termination simplicitor has been issued. An order would become bad if after starting proceedings, those are left mid-way or after recording satisfaction into the guilt or misconduct of an employee, final authority comes to a conclusion that the person deserves to be removed without any inquiry. An order which is simple termination order, would not be a penal order unless the fact are proved.

11. So far as substantial question of law no.2 is concerned, unfortunately, but for the pleadings of the plaintiff that the juniors to the plaintiff have been retained in services, no material has been brought on the records. Present is not a case where a simple allegation would prove correctness of the allegation. True it is that trite law is that if material allegations are not controverted or denied, the Court would be entitled to presume that the same are correct, but such principle is not of universal application, specially, in cases where assertion of fact in itself is not proof of the

fact. If the plaintiff wanted the courts below to believe that the juniors to the plaintiff have been retained in services, then, he could produce some orders of appointment or could detail names of the persons who were juniors to him. If vague allegation is made by the plaintiff, then, it would almost be impossible for the defendant to give its reply. The trial court was unjustified in presuming that the allegations have not been properly controverted. It is settled principle of law that from the pleadings, stray sentences are not to be read, but pleadings are to be read as one document. If the appellate court, after reading the written statement as one complete document, has observed that from bare reading of the written statement it would appear that the material allegations made by the plaintiff have been denied by the defendant, then, it would not be proper for this Court to hold that the learned District Judge was unjustified in making such observation.

12. So far as substantial question of law no.3 is concerned, it would go with substantial question no.2. Virtually, question no.3 is amplification of question no.2, where the pleadings say that the order is bad, because, it is based on the policy of pick and choose, inasmuch as, the defendant has not specifically denied the allegation that juniors to the plaintiff were retained in services. While discussing the said question, I have already held that the plaintiff has failed to prove the allegation.

13. After giving my full consideration to the questions formulated by this Court and the arguments raised by the learned counsel, I am unable to decide any question in favour of the plaintiff. The first appellate court was absolutely justified in reversing the judgment and decree of the learned trial court and in dismissing the suit of the plaintiff.

14. The appeal deserves to and is accordingly dismissed. However, looking to the facts of the

case, parties shall bear their own costs all through.

[R.S. GARG, J.]

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